ANG CHIN SEONG A

v.

CHONG MAY WAI & ANOR

HIGH COURT MALAYA, PULAU PINANG B
CHEW SOO HO JC
[DIVORCE PETITION NO: 33-1075-2010]
31 MAY 2012

FAMILY LAW: *Divorce - Adultery - Claim for damages - Whether adultery must be proved beyond reasonable doubt - Adultery between petitioner and third party - Whether respondent entitled to damages against third party - Respondent's financial loss - Whether damages should be compensatory and exemplary or punitive - Law Reform (Marriage and Divorce) Act 1976, ss. 54(1), 58(2) and 59(3)(a)* C D

The respondent ('wife') claimed damages against Eng Lee Mei ('party cited') on the ground of adultery committed by the party cited and the petitioner ('husband'). The respondent testified that she found the petitioner in a hotel room with the party cited hiding inside the toilet in the same hotel room. The respondent also found a ladies swimming costume and a man's swimming trunk as well as two tooth brushes inside the toilet. The whole episode at the hotel was recorded and the disc was produced in court. The party cited contended that the petitioner and her were colleagues and good friends. She further explained that she was on a business trip to Kuala Lumpur and had met up with the petitioner to have dinner with the petitioner before she checked into another hotel. The party cited contended that she was merely in the toilet to brush her teeth and that the party cited retreated to the toilet to avoid being seen by any unwelcomed visitors. It was also submitted by the party cited that the act of finding the petitioner and the party cited in a compromising position was not enough to prove adultery as adultery must be proved beyond reasonable doubt. In the alternative, even if adultery was found, damages should not be punitive under s. 58(2) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). A further admitted fact was that the party cited and the petitioner had also jointly purchased a property. Although the sale and purchase agreement E F G H I

A was dated 17 October 2011, a solicitor's letter dated 6 October 2008 showed that a housing loan was granted to both the petitioner and the party cited to purchase the said property. However, the petitioner attempted to say that the date 6 October 2008 was wrongly stated but without the maker of the said letter B being called to clarify. This was specially so that the petitioner had left the respondent and the matrimonial home on 9 December 2008. The issue before the court was whether there was adultery proved against the party cited and if it was, whether the respondent had proved the damages claimed.

C

Held (allowing respondent's claim with costs):

(1) The petitioner and the party cited were properly clothed and were not found in an act of intimacy when the respondent was allowed into the hotel room. However, one could not be D expected to be on the bed in an intimate position when the door bell of the hotel rang unlike the case if the door was broken into. It was not unreasonable to find that upon hearing the door bell that the party cited retreated to the toilet to avoid being seen by any unwelcome visitors knowing very well E their marital status then that the petitioner was the husband of another woman while the party cited was the wife of another man. (para 10)

(2) The swimming trunk of the petitioner was found hanging in F the toilet in the hotel room. This was in direct conflict with the evidence of the party cited that she had just unpacked her luggage upon returning to the hotel room just to brush her teeth after dinner. Both the parties were together till the respondent's arrival late at night. Therefore, the petitioner and G the party cited could have done what they desired for all those hours without disturbance. It was also untenable or improbable that the party cited would only contemplate to check in another hotel in the middle of the night or in the early hours of the next morning. (para 10)

H

(3) Without the maker of the solicitors letter being called to clarify the mistake as to the date, the court could not come to a finding of fact that the date in the solicitor's letter was a mistake. The intention to purchase the said property jointly I with the party cited could have arisen two months before the

petitioner finally left the matrimonial home. The irresistible inference for the petitioner to purchase the said property jointly with the party cited was most probably for them to live as husband and wife. (para 12)

(4) It was beyond a reasonable doubt that the party cited and the petitioner had an affair in their joint presence in the same hotel and was to perpetrate their adulterous act when the petitioner's marriage was still in subsistence with the respondent. Since the parties had agreed to a divorce and a *decree nisi* had already been issued, there was no need for the respondent to prove that she found it intolerable to live with the petitioner upon that adultery pursuant to s. 54(1)(a) of the LRA. The prove that was required after the *decree nisi* was to show that there was such an adultery and that the court may award damages against the adulterer under s. 58 of the LRA. (para 14)

(5) The damages claimed was actual loss which was undisputed and was neither exemplary nor punitive. Since the loss occurred when the petitioner left the matrimonial home was not challenged or rebutted, it was just and reasonable for an award of damages of RM12,255.75 to be made from December 2008 till the date when the *decree nisi* was granted which was in October 2011. The award of RM12,225.75 was not excessive as the loss was not only to the respondent but also to her five children who were still young. The party cited was also ordered to pay the costs of the proceeding pursuant to s. 59(3) of the LRA. (paras 16 & 17)

Case(s) referred to:

Soon Peng Yam & Anor v. Bank of Tokyo - Mitsubishi (Malaysia) Bhd [2004] 1 CLJ 532 CA ***(refd)***

Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, ss. 54(1)(a), 58(2), (3)(b), 59(1), (3)

For the petitioner - Desmond Lee Kheng Hong; M/s Allen & Assocs
For the respondent - Ooi Siew Kim; M/s Ooi Siew Kim & Co

Reported by Sandra Gabriel

A

JUDGMENT

Chew Soo Ho JC:

Introduction

B **[1]** Petitioner abovenamed was the husband while the respondent was the wife. Their divorce had been granted by the court and the trial before this court was pertaining to the respondent's claim against Eng Lee Mei who was the party-cited (but wrongly stated as co-respondent) on grounds of adultery
C committed by the party-cited with the petitioner.

The Respondent's Case

[2] Respondent (SP1) testified that on 9 June 2007, she went
D with her sister (SP2) and brother SP3 to Summit Hotel Subang USJ, Subang, Selangor. At about 12 midnight to 1am, she rang the door bell of the petitioner's room. Five to ten minutes later, the room was opened by the petitioner. All the three of them entered. The petitioner was inside the room while the party-cited
E was hiding inside the toilet of the same room. She appeared in shock seeing them with video recorder. Respondent searched party-cited's bag and found her NRIC. Her luggage bag was found unpacked. Inside the toilet, respondent found a lady's swimming costume and a man's swimming trunk as well as two
F tooth brushes. Petitioner had been saying that it was his fault and that respondent could get angry with him but should not search the things of the party-cited or take video.

[3] The whole episode at the aforesaid hotel was recorded in
G video and the disc was produced without party-cited's objection after learned counsel for the party-cited had viewed the video in court. The transcript of the conversation that took place during the episode and some of the pictures in the video were reproduced in 'ikatan dokumen responden' marked as ikatan A
H which were not objected to but subject to cross-examination. The version of events narrated by the respondent was corroborated by her sister SP2 who took the video and her brother SP3 who accompanied them.

I

The Party-Cited's Case

[4] Party-cited's version was that the petitioner and herself were colleagues and good friends. On 9 June 2007, she was on a business trip to Kuala Lumpur and was supposed to stay in Holiday Inn Hotel at Glenmarie. She arrived at airport Kuala Lumpur and later met up with the petitioner around 3 - 4pm at the Summit shopping mall. The purpose was to have dinner with the petitioner before she checked in at Holiday Inn. She placed her luggage in the petitioner's hotel room. They went for dinner and finished at about 9 - 10pm. They took 10 - 15 minutes to walk back to the hotel after dinner to collect her luggage. As she was in the toilet, she heard someone pressing the door bell. When she later opened the toilet door, she was shocked to see the respondent and others having a video camera. She was asked to go down to the lobby and later she was allowed to leave with her luggage. At that time, she was wearing a T-shirt and a pair of long pants. She admitted that the swimming costume was in the said toilet and so was her tooth brush. She explained that she unpacked her luggage to get her tooth brush to brush her teeth after dinner as a habit.

[5] On the premises known as 5-12-2 (Type B), Level 12, Hillcrest Residences, Jalan Bukit Jambul, Bayan Lepas, 11900 Pulau Pinang (exh. D4 - sale and purchase agreement) ('the said property'), party-cited agreed that she owned this property jointly with the petitioner saying perhaps that she has the intention to marry petitioner.

[6] Petitioner testified as SD2. He gave similar version as the party-cited as to the dinner meet and the time of their dinner, the time taken to walk back to his hotel followed by the incident in his hotel room with the arrival of respondent with SP2 and SP3. It was immediately upon their return that respondent came. Petitioner said he apologised to respondent and explained to her the situation. Everything was normal thereafter. He admitted the swimming costume of party-cited was in the toilet of his hotel room and said the tooth brush was his.

The Issues

[7] The issues before the court are whether there was adultery proved against the party-cited and if it was, whether the respondent had proved the damages that she was claiming. Both issues can be considered together as evidence are inter-linked.

Findings Of Court

Adultery & Damages

[8] Learned counsel for party-cited submitted that there was no adultery as there was no act of sexual intercourse to prove adultery in the sense that the respondent finds it intolerable to live with the petitioner. She also submitted that adultery must be proved beyond reasonable doubt. In the instant case, although the party-cited and the petitioner were found in compromising position, she submitted that there was no act of adultery. Alternatively, even if adultery was found, damages should not be punitive under s. 58(2) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA').

[9] Learned counsel for the respondent submitted that from the evidence, documents and video recording and the time when they were found in the hotel room of between 12 midnight and 1am were proof of adultery. In addition, party-cited's luggage was unpacked, her swimming costume was found in the toilet with no explanation coupled with the fact that she had jointly purchased the said property of more than RM800,000 with the petitioner. All these showed that there had been adultery committed. On damages, it was submitted that the petitioner stopped all contributions to the family since the day he left the matrimonial home for 36 months from December 2008 until the *decree nisi* being granted on October 2011. Hence, the damages as computed in bundle A p. 9 were consequent to the adultery of the party-cited with the petitioner.

[10] The episode that occurred on 9 June 2007 at the Summit Hotel room was recorded contemporaneously and it was not and cannot in fact be denied of what had transpired. It is a fact that both the party-cited and the petitioner were found in the same hotel room at the late hour in the night. It is also a fact that they were properly clothed and were not found in the act of intimacy when the respondent was allowed into the hotel room. In the circumstances of this case when the door bell of the hotel was ringing, one cannot expect the door to be opened with both the party-cited and the petitioner still continuing to be on the bed in an intimate position unlike the case if the door was broken into. A fact to be noted is that the door was opened not immediately but about 5 - 10 minutes after the respondent had rung the door

bell. If there was nothing between the party-cited and the petitioner in the said room, there is no reason to open the door in 5 - 10 minutes. If as the petitioner had said in evidence that the respondent came immediately upon their arrival in the room, I find it difficult to believe that it could be such a coincidence that the party-cited happened to be in the toilet allegedly brushing her teeth then. She should be in the room proper rightly if it is true that it was immediately after their return. It is not unreasonable to find that upon hearing the door bell that the party-cited retreated to the toilet to avoid seeing or being seen by any unwelcome visitors at that hour in the night knowing very well their marital status then that petitioner was the husband of another while the party-cited was the wife of another man. I do not find the explanation of a coincidence probable at all on a balance of probabilities. One admitted fact which remained unexplained throughout the trial is that the swimming costume of party-cited and the swimming trunk of the petitioner were found hanging in the toilet in the hotel room. This fact would fly in the face of the party-cited and in direct conflict with her evidence that she just unpacked her luggage upon returning to the hotel room just to take her tooth brush and tooth paste to brush her teeth after dinner. Petitioner on the other hand said that the tooth brush belonged to him. If she had just unpacked only then, how could her swimming costume be hanging up in the toilet? From the evidence of the party-cited herself, she had met petitioner at the Summit shopping mall at 3 - 4pm and she left her luggage in the said hotel room. Thus, both party-cited and the respondent were together since 3 - 4pm till the respondent's arrival at that late night. They could have had their enjoying time of taking a dip in the pool and any other acts they desired for all those hours without disturbance. Ironically, if the alleged relationship between party-cited and the petitioner was merely good friends, I find it hard to believe why party-cited could not check in her own hotel first before meeting the petitioner for dinner which she had ample time having arrived at Kuala Lumpur before 3 - 4pm if it is true that their meeting was purely for a dinner between good friends.

[11] Again, I also find it untenable or improbable that the party-cited would only contemplate to check in her hotel in the middle of the night or on the early hour the next morning.

[12] A further admitted fact is that party-cited and petitioner had jointly purchased the said property *vide* exh. D4, the sale and purchase agreement at the purchase price of RM878,428. Although this sale and purchase agreement was dated 17 October 2011, a solicitor's letter dated 6 October 2008 (bundle A pp. 7-8) showed that Malayan Banking Berhad had agreed to grant a housing loan of RM790,585 to both petitioner and party-cited to buy the said property. Petitioner was attempting to say that the date 6 October 2008 was wrongly stated but without the maker of the said letter being called to clarify, this court cannot come to such finding of fact that it was a mistake. This is especially so that petitioner had left the respondent and the matrimonial home on 9 December 2008. The intention to purchase the said property jointly with the party-cited could have arisen two months before petitioner finally left the matrimonial home. The irresistible inference for the petitioner to purchase the said property jointly with the party-cited, in the circumstances of this case, is most probably for them to live together as 'husband' and 'wife'. In the absence of any other reason or explanation to the contrary, I can't perceive why a married man would buy a dwelling house jointly with the wife of another man although the party-cited had ultimately been divorced with her husband.

[13] Judging all the facts and evidence in this case, I find beyond reasonable doubt that the party-cited and the petitioner had an affair and that their joint presence in the same hotel room on the 9 June 2007 was to perpetrate their adulterous act when particularly, the marriage of the petitioner and the respondent at the material time was still in subsistence.

[14] I have also considered that after that hotel incidence, both the petitioner and the respondent had lived together for about one and half years before petitioner finally left the matrimonial home. However, it cannot be denied that it was due to the adultery between the party-cited and the petitioner that had led the marriage between petitioner and respondent to be broken down irretrievably. The adultery is the causation for such break down. The time of one and half years does not erase that stigma in the mind of the respondent being the wife and a mother of five children born of the petitioner. Moreover, since the parties have agreed to the divorce and a *decree nisi* has already been issued, there is therefore no necessity for the respondent to prove that she found it intolerable to live with the petitioner upon that

adultery pursuant to s. 54(1)(a) LRA which refers to proof of the break down of marriage. The proof that the respondent is required at this stage after *decree nisi* is not the ground for break down of marriage but to show that there was such an adultery and that the court may award damages against the adulterer under s. 58 LRA. In s. 59(1) LRA, it provides that the court may even award damages against a co-respondent notwithstanding that the petition against the respondent is dismissed or adjourned. Thus, the damages against a co-respondent does not depend on the requirement to prove that the adultery had made it intolerable for the respondent to live with the petitioner. It will only be relevant if the respondent were to petition for a dissolution of marriage for which she would bear the burden of proof to prove one of the grounds under s. 54(1) LRA. It does not apply in the circumstances of this case.

[15] On damages, having found the existence of adultery, this court may award the respondent damages as this court may think fit but that the award shall not include any exemplary or punitive element; see s. 58(3)(b) LRA. Respondent had listed out her damages *vide* bundle A p. 9 as to the damages she suffered which arose upon the petitioner leaving the matrimonial home and all his five children of the marriage consequent upon the affairs with the party-cited. This computation of RM12,255.75 per month of loss was never challenged at all by the party-cited in cross-examination and must thus be construed as an acceptance of this part of the crucial evidence *vide* bundle A p. 9, the table of computation which respondent had testified thereto. In *Soon Peng Yam & Anor v. Bank of Tokyo - Mitsubishi (Malaysia) Bhd* [2004] 1 CLJ 532; [2004] 2 MLJ 31 CA, His Lordship Alauddin JCA (as he then was) said at p. 536 (CLJ); p. 36 (MLJ):

> ... Thus it must be accepted that the failure to cross-examine the defendants on important aspects of their evidence must be treated as an acceptance of those parts of their evidence.

[16] See also *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 FC. Therefore, in the absence of any challenge or dispute nor any rebuttal evidence from the party-cited or the petitioner, I must accept the respondent's evidence of her computation of loss per month as listed out in bundle A p. 9 as an admitted fact. Since the loss occurred when the petitioner left the matrimonial home from 9 December 2008 which was not

challenged nor rebutted, I find it just and reasonable to make the award of damages to take effect from December 2008 till the date when the *decree nisi* was granted which is in October 2011. The damages as claimed is actual loss which is undisputed and it is neither exemplary nor punitive. I do not find the award of damages to be excessive as the loss is not to the respondent alone but to her five children who are young and need to be fed.

Conclusion

[17] For the foregoing reasons, after considering all evidence and the respective submissions by the parties, I hold that the respondent had proved beyond doubt that the party-cited had committed adultery with the petitioner and I therefore award damages against the party-cited at RM12,255.75 x 34 months from December 2008 to October 2011 when *decree nisi* was granted. I also order that the party-cited shall pay the costs of this proceeding pursuant to s. 59(3) LRA. However, the damages for refinancing of respondent's house which is to her benefit is disallowed.